ORIGINAL

Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1223

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HERMAN C. DAVIS, WARDEN,

Petitioner,

vs.

JAMES ANDERSON STOKES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

RICHARD JOSEPH RYAN, JR.
COUNSEL OF RECORD

RICHARD J. RYAN, SR.

600 Lincoln American Tower
60 N. Main Street
Memphis, Tennessee 38103
(901) 527-4715

Counsel for Respondent
James Anderson Stokes.

RECEIVED
FEB 21 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

Does The Tennessee Jury Instruction which instructs: that "all homicides are presumed to be malicious" and when a deady weapon is involved "there is raised a presumption of murder in the second degree unless it is rebutted by other facts and circumstances" violate this Court's ruling in Sandstrom v. Motanna 442 U.S. 510 (1979), Mullaney v. Wilbur 421 U.S. 684 and In re Winship 397 U.S. 358.

TABLE OF CONTENTS

Questions Presented for Review 1

Table of Authorities 3

Opinions Below 4

Jurisdiction 4

Constitutional Provisions Involved 4

Statement of the Case 5

Reasons for Denying the Writ 7

Conclusion 10

TABLE OF AUTHORITIES

Cases Cited:

Bolin v. State 678 S.W.2d 40 8

Coffee v. State 11 Tenn. 287 (1833). 7

Everett v. State 528 SW2d 25 (1975). 7,8

Gann v. State 214 Tenn. 711 (1964) 8

In Re Winship 397 U.S. 358 7,8

Mitchell v. State 13 Tenn. 279 (1833). 7

Mullaney v. Wilbur 421 U. S. 684 (1975). 7,8

Sandstrom v. Montana 442 U.S. 510 (1979). 7,8

Ulster County Court v. Allen 442 U.S. 140 (1979) . . 8

OTHER AUTHORITIES CITED

Tennessee Pattern Jury Instructions, Criminal West Publishing Co. (1978) 7

4 W. Blackstone Commentaries 201 7

OPINIONS BELOW

The Petitioner's brief accurately states the opinions below and the Appendix accurately reproduces those opinions.

JURISDICTION

The Court does have discretionary jurisdiction of this case under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner correctly states the constitutional provisions involved.

STATEMENT OF THE CASE

There was no testimony at the District Court. All evidence referred to came in the Tennessee Trial Court.

The evidence at the trial presented two sharply contrasting views of the shooting. Stokes always contended that the shooting was an accident. The State's witnesses, while admitting making prior statements that would have questioned either their ability to actually see what happened or whether they really knew what happened, testified that Stokes came to Miss West's house and shot the deceased for no apparent reason.

Police photographs from the crime scene indicated empty wine and beer containers. A neighbor, Nathaniel Gunn, who took Miss West and Mr. Brooks to another home to spend the night testified over their denial they had been drinking.

Nellie Stokes, the sister of Respondent, testified that at Police Headquarters the day after the shooting Miss West said she didn't know what happened.

Counsel for the Defendant at the close of the evidence for the State moved for a directed verdict on the second degree murder charge, because the State had failed to show "actual malice or ill will". The Trial Court denied this motion, stating that "an unlawful killing is presumed to be murder in the second degree".

Stokes testified that when he came to the house the four people there were laughing and drinking; that the day of the shooting was the first time he had ever been in the company of the deceased.

After the instruction, the Jury Foreman returned after some deliberation seeking a new instruction on malice stating,

"We seem to have a problem on the part about the malice. We wondered if maybe you could read it again and maybe explain it a little bit more in laymen's terms exactly what it means". The Trial Court denied this request, and the jury returned with a verdict of "Guilty of murder in the second degree". The Defendant appealed to the Tennessee Court of Criminal Appeals complaining about the malice charge. This was rejected as was his request for permission to appeal to the Tennessee Supreme Court.

Stokes petitioned for Writ of Habeas Corpus in the United States District Court for the Western District of Tennessee asserting the malice instruction violated his Due Process Rights. The District Court sustained Stokes' contention. This judgment was affirmed by the Court of Appeals for the Sixth Circuit. Petitioner's request for a rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly decided that the Trial Court's jury instruction on malice violated due process.

This Court is being asked in reality not to find that the Sixth Circuit Court of Appeals has misapplied Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 but in effect either reverse or to retreat from Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 955. Ct. 1881, and In Re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068. Clearly in Mullaney this Court found that the historical rule of law was that in homicide cases once the prosecution had proved that death had occurred "it was incumbent upon the prisoner to make out, to the satisfaction of the Court and jury all circumstances of justification, excuse or alternative", 4 W.Blackstone, Commentaries 201, Mullaney, 421 U.S. at 693, 44 L.Ed.2d at 516, 95 S.Ct. 1881. Tennessee clearly followed this theory from the earliest cases, and required the defendant to carry the burden of persuation. Tennessee ruled that "...if A killed B, and that fact alone being established by the State, the malice is presumed, and the onus of exculpation is upon the Defendant", Coffee v. State, 11 Tenn. 226 at 233 (1832); Mitchell v. State, 13 Tenn. 279 at 287 (1833).

In order to interpret the true nature of the presumption recourse to the Tennessee cases is necessary. The complained of instruction is The Tennessee Pattern Instruction on Second Degree Murder, see Tennessee Jury Instructions, Criminal, West Pub. Co. (1978) (TPI Crim. 20.04) this instruction cites as authority Everett v. State,

528 S.W.2d 25. Everett in turn cites as authority Gann v. State, 214 Tenn.711, 383 S.W.2d 32 (1964). Everett 528 S.W.2d at 25. Gann in turn cites Coffee v. State, supra, as the law in Tennessee. Gann 383 S.W.2d at 36.

This historical analysis clearly shows that rather than the Sixth Circuit and the Federal District Court looking at the instruction "in artificial isolation" these courts were clearly following this Court's adherence to Mullaney, Winship and Sandstrom Tennessee has continued to follow a theorty of law rejected by this Court.

In Ulster County Court v. Allen, 442 U.S. 140, 60 L.Ed.777, 99 S.Ct. 2213, this Court in analyzing the various "evidentiary devices" adhers to the rule that ..."in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant. The device must not undermine the fact-finder's responsibility at trial,based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt". Ulster County v. Allen, 442 U.S.140,156, 60 L.Ed.2d 777,791 (1979) (Citations ommitted). Tennessee's clear historical rule requires the Defendant to offer proof and to persuade the jury of his lack of malice, a necessary element of murder in the second degree.

This jury clearly had doubts as to the malice charge when they returned and stated:

> "We seem to have a problem on the part about the malice. We wondered if maybe you could read it

again and maybe explain it a bit more in layman's terms exactly what it means". (R. p213)

The Trial Judge reread the complained of charge.

The dual presumption of sufficient malice to convict if there was shown the use of a deadly weapon, and the presumption of malice sufficient to convict the defendant of murder in the second degree from the mere proof of a killing violates both Sandstrom and Mullaney holdings.

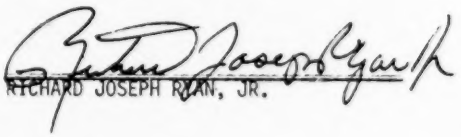
Finally, the State seeks a grant of certiorari based upon the recent case of State v. Bolin, 678 S.W.2d 40 (Tenn.1984) which the State says "is directly inconflict" with the Court of Appeals for the Sixth Circuit. This is clearly erroneous, first, Bolin has only the deadly weapon presumption and not the homicide charge in question. Secondly, the Tennessee Supreme Court characterizes the charge as "more permissive" than the Sandstrom charge, State v. Bolin, 678 S.W.2d 40 at 43. Thirdly, Bolin found that no reasonable jury could have found the instruction as mandatory or conclusive or as shifting the burden of proof on the element of malice, Bolin, 678 S.W.2d at 44.

Finally, and perhaps most importantly, on the conflict with future cases, the Bolin Court warns trial judges "that the word presumption should not be used, except in instructing on the presumption of innocence", State v. Bolin, 678 S.W.2d 40, at 44. Thus any fears as to future problems are now moot.

CONCLUSION

For the reasons stated the Respondent urges this Court to deny the Writ of Certiorari.

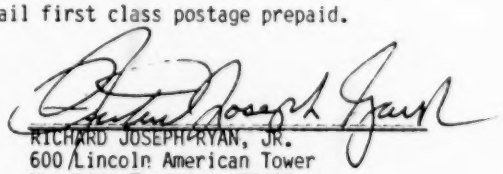
Respectfully submitted,



RICHARD JOSEPH RYAN, JR.

CERTIFICATION

I, RICHARD JOSEPH RYAN, JR., do hereby certify that I have served W. J. Michael Cody, Attorney General and Reporter for the State of Tennessee, Attorney for the Petitioner in this cause, a true and exact copy of this Response at his office at 450 James Robertson Parkway, Nashville, Tennessee 37219, by placing the same in the United States mail first class postage prepaid. February 20, 1985.



RICHARD JOSEPH RYAN, JR.
600 Lincoln American Tower
Memphis, Tennessee 38103
(901) 527-4715